

November 9, 1989

The Honorable Andrew Levin
Senator, First District
The Fifteenth Legislature
State of Hawaii
State Capitol, Room 208
Honolulu, Hawaii 96813

Dear Senator Levin:

Re:Disclosure of Hawaiian Home Lands Waiting List

This is in reply to your request, which was forwarded to the Office of Information Practices, for an advisory opinion concerning the status of the Department of Hawaiian Home Lands waiting list of applicants for homestead leases under the new public records law, the Uniform Information Practices Act (Modified), Haw. Rev. Stat. Chapter 92F (Supp. 1988) ("UIPA").

ISSUE PRESENTED

Whether the waiting list for the award of homestead leases prepared by the Department of Hawaiian Home Lands is a government record which must be available for public inspection and copying under the UIPA.

BRIEF ANSWER

Under the UIPA, an applicant's name, island-wide rank, area code, application date and deferral status are subject to public inspection and duplication. With respect to such data, the applicant's privacy interest is outweighed by the public interest in disclosure. However, disclosure of an applicant's social security number and home address would constitute a

"clearly unwarranted invasion of personal privacy" under the UIPA, since disclosure would not further any public policy underlying the UIPA.

FACTS

The Department of Hawaiian Home Lands ("Department") administers the provisions of the Hawaiian Homes Commission Act, 1920, as amended, and the provisions of Article XII, Sections 1 to 4, of the Constitution of the State of Hawaii. Under the Hawaiian Homes Commission Act, 1920, ("Act"), the Department is authorized to lease tracts of property which are designated as "available lands" to native Hawaiians. Approximately 200,000 acres of land are designated as "available land" under the Act.

Only native Hawaiians over age 18 who are descendants of not less than one-half part of the races inhabiting the Hawaiian Islands before 1778 are eligible to receive an award of a homestead lease. Native Hawaiians who are awarded homestead leases by the Department pay lease rent in the amount of one dollar (\$1.00) per year, for a lease term of ninety-nine (99) years.

There is currently a waiting list of native Hawaiians who are awaiting the award of homestead leases under the Act. Approximately 19,000 people are presently on the waiting list, although some persons on the waiting list have applied for tracts of available land on more than one island, and others have opted to decline homestead awards offered by the Department in hopes of receiving a tract more suitable to their wishes. The waiting list contains the social security number, name, home address, an area code which indicates the island and type of land requested, an island-wide rank and application date.

The Department's administration of the homestead lease program has been the subject of public criticism and widespread public interest. During the five days of Oversight Hearings on the Administration of Native Hawaiian Homelands held in August 1989, before the Select Committee on Indian Affairs, United States Senate, there was testimony critical of the lengthy delays in the award of homestead leases by the Department. Some speakers testified that they or those they know have waited over 15 years for a homestead lease award. Transcript (Draft) of

Hearings Before the Select Committee on Indian Affairs, United States Senate, pages 237, 280, 357 (August 7, 1989). Further, other speakers hinted at possible manipulation of the waiting list and possible favoritism in ranking those placed on the waiting list, but no such allegations have been proven. Transcript (Draft) of Hearings before the Select Committee on Indian Affairs, United States Senate, pages 212, 250 (August 7, 1989).

DISCUSSION

The UIPA is the State's new public records law which promotes open government while protecting the individual's constitutional right to privacy. The competing purposes of the UIPA are set forth at Haw. Rev. Stat. . 92F-2 (Supp. 1988) as follows:

This chapter shall be applied and construed to promote its underlying purposes and policies, which are to:

- (1) Promote the public interest in disclosure;
- (2) Provide for accurate, relevant, timely, and complete government records;
- (3) Enhance governmental accountability through a general policy of access to government records;
- (4) Make government accountable to individuals in the collection, use, and dissemination of information relating to them; and
- (5) Balance the individual privacy interest and the public access interest, allowing access unless it would constitute a clearly unwarranted invasion of personal privacy.

In enacting the UIPA, the legislature concluded that:

[I]t is the policy of the State that the formation and conduct of public policy--the discussions, deliberations, decisions, and action of government agencies--shall be conducted as openly as possible.

Haw. Rev. Stat. . 92F-2 (Supp. 1988).

The UIPA begins with the general directive that, "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. . 92F-11(a) (Supp. 1988). The UIPA contains various exceptions to this general rule which are set forth at Haw. Rev. Stat. . 92F-13 (Supp. 1988). Among other things, the UIPA does not require disclosure of "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. . 92F-13(1) (Supp. 1988). Under the UIPA, "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interests of the individual." Haw. Rev. Stat. . 92F-14(a) (Supp. 1988).

The waiting list prepared by the Department constitutes a "government record" maintained by an "agency." See, Haw. Rev. Stat. . 92F-3 (Supp. 1988). Therefore, as a preliminary matter, it must be determined whether the disclosure of the names, addresses, social security numbers, application dates, island-wide rank and area code of applicants could implicate some personal privacy interest. In doing so, the UIPA's legislative history suggests that federal "case law under the Freedom of Information Act ["FOIA"] should be consulted for additional guidance." S. Stand. Comm. Rep. No. 2580, 14th Leg., 1988 Reg. Sess., Haw. S.J. 1093, 1094 (1988).

The United States Supreme Court in United States Department of State v. Washington Post, Co., 456 U.S. 595, 102 S. Ct. 1957, 72 L. Ed. 2d 358 (1982), construing a provision in FOIA similar to Haw. Rev. Stat. . 92F-13(1), held that Exemption 6 should not be construed to encompass "a narrow class of files containing only a discrete kind of personal information." Id., 456 U.S. at 601-02, 102 S. Ct. at 1961. Rather, the Court opined that Exemption 6 was to be applied to "any government records on an individual which can be identified as applying to that individual." Id. Further, we concur with those authorities

that have held that individuals have a significant privacy interest in details such as their name, home address and social security number.¹ Future Office of Information Practices' opinion letters will address the issues surrounding social security numbers and home addresses in further detail.

In balancing the individual's privacy interest in information contained in government records against the public interest in disclosure, recent court decisions have established that under FOIA, only a FOIA-based public interest may be considered by the court. In United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. _____, 103 L. Ed.2d 774, 109 S. Ct. 1468 (1989), the United States Supreme Court held that the basic policy of full disclosure of government records unless information is exempted "focuses on the citizens' right to be informed about 'what their government is up to.' Official information that sheds light on an agency's performance of its statutory duties falls squarely within" FOIA's purposes. Id. 109 S. Ct. at 1481.

Similarly, in two cases subsequent to the Reporters Committee decision, the United States Court of Appeals for the

¹ See, United States Department of the Navy v. FLRA, 840 F.2d 1131, 1136 (3rd Cir. 1988) (individuals generally have a meaningful interest in information concerning their homes which merits some protection); Heights Community Congress v. Veterans Administration, 732 F.2d 526, 529 (6th Cir. 1984) (important privacy interest in "home addresses"); American Federation of Government Employees v. United States, 712 F.2d 931, 932 (4th Cir. 1983) ("employees have strong privacy interest in their home addresses"); Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 136-137 (3rd Cir. 1974) (privacy of the home traditionally respected); Minnis v. United States Dept. of Agriculture, ("disclosure would implicate more than a minimal privacy interest"); DiPersia v. U.S.R.R. Retirement Bd., 638 F. Supp. 485, 489 (D. Conn. 1986) ("substantial privacy interest exists in a list of names and addresses"); I.B.E.W. No. 5. v. U.S. Dept. of Housing & Urb. Dev., 852 F.2d 87 (3rd Cir. 1988) (social security number); DOE v. Reg. of Motor Vehicles, 528 N.E.2d 880 (Mass. App. Ct. 1988) (social security number).

District of Columbia reaffirmed that under the rationale of the Reporters Committee case, the disclosure of names and home addresses of private citizens would be "clearly unwarranted", unless the public would learn something directly about the workings of the government by knowing such information. National Association of Retired Federal Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989); Federal Labor Relations Authority v. U.S. Department of the Treasury, 884 F.2d 1446, No. 87-1107 (D.C. Cir., Sept. 12, 1989).

In applying the decisions of Reporters Committee and its progeny to the present facts, we conclude that disclosure of the names, island-wide rank, application dates, area codes and deferral status of applicants for homestead leases would "shed light on an agency's performance of its statutory duties." Reporters Committee, 109 S. Ct. at 1481. There have been allegations of possible manipulation of the waiting list. In addition, there has been widespread criticism of the lengthy delay associated with the award of homestead leases by the Department. Despite the fact that no fraud in the administration of awards has been proven, disclosure of the names, island-wide rank, application dates, area codes and deferral status of applicants falls squarely within UIPA's purpose of "opening up the government processes to public scrutiny," which the Legislature concluded "is the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. . 92F-2 (Supp. 1988).

Moreover, disclosure of this information will eliminate any possibility of favoritism or manipulation in the award of homestead leases, and allow the public to better judge whether the award process is being efficiently administered. We believe that like FOIA, the UIPA was intended to allow the public to use its provisions "to ensure an informed citizenry ... needed to check against corruption and hold the governors accountable to the governed." NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, 98 S. Ct. 2311, 2327, 57 L. Ed.2d 159 (1978).

On the contrary, disclosure of the home addresses and social security numbers of homestead lease applicants will shed little, if any, light upon the conduct of the Department and the administration of the homestead lease program. Since a significant privacy interest exists in this information, and little, if any, public interest exists in its disclosure, we conclude that disclosure would "constitute a clearly unwarranted invasion of personal privacy" under the Haw. Rev. Stat. .

The Honorable Andrew Levin
November 9, 1989
Page 7

92F-13(1) (Supp. 1988). Accordingly, after the waiting list has been sanitized of the home addresses and social security numbers of the applicants, the waiting list should be made available for public inspection and copying under the UIPA.

CONCLUSION

Although a significant privacy interest exists in details such as one's name, address and social security number, the disclosure of the name, island-wide rank, application date, area code and deferral status of homestead lease applicants would further the policy behind the UIPA to open government processes to the light of public scrutiny. Therefore, we believe that the public interest in disclosure outweighs the individual's privacy interest in such information.

On the contrary, disclosure of homestead lease applicants' home addresses and social security numbers would further no UIPA based public policy and therefore, disclosure would constitute a "clearly unwarranted invasion of personal privacy" under Haw. Rev. Stat. . 92F-13(1) (Supp. 1988). Accordingly, we conclude that after the applicants' home addresses and social security numbers have been deleted from the waiting list, it must be made available for public inspection and copying under the UIPA.

Hugh R. Jones
Staff Attorney

cc: Honorable Ilima Piianaia, Director
Department of Hawaiian Home Lands

APPROVED:

Kathleen A. Callaghan
Director